NO. 2448

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY M. SMITH, as EXECUTRIX,

Appellant.

vs.

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLEE.

T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
T. J. HOOLAN,
Of Counsel for Appellee.

Filed

OCT 22 1914

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY M. SMITH, as EXECUTRIX,

Appellant.

vs.

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLEE.

I.

The Court had jurisdiction to re-open and correct the account of the Guardian upon the facts and circumstances of this case. This was a proper case for the exercise of the power and the power was properly exercised.

Griffith v. Godey, 113 U. S. 89. (A case from California).

This was cited at the hearing.

Van Bokkelen v. Cook, 28 Fed. Cases, page 949, Case No. 16831. (A Nevada case heard before Judges Field, Sawyer and Hillyer.)
Froebrich v. Lane, 45 Ore. 13; 76 Pac. 351.
106 American State Reports, 634;
Silva v. Santos, 71 Pac. 703;
Lataillade v. Orena, 27 Pac. 924.
Clyce v. Anderson, 49 Mo. 37; (This case has been cited with approval in Howard v. Scott, 225 Mo. 714; Mayold v. Bacon, 229 Mo. 487).

Scoville v. Brock, 79 Vt. 449, 65 Atl. 577, 118 Am. St. Reports, 975 and note.
Story's Equity Jurisprudence, Sec. 187; (13th Ed.)
State v. Peckham, 36 N. E. 28;
Euler v. Euler (Ind.), 102 N. E. 856;
Ridenbaugh v. Burnes, 14 Fed. 93.

The jurisdiction of the United States Courts over accounts and other matters involved in probate proceedings is considered and stated also in

Payne v. Hook, 7 Wall. 425.

The alleged order of discharge, put in evidence by the defendant, offers no impediment to the granting of the relief prayed for, even assuming the validity of this order. In many, if not most, of the cases of this nature which have been before the courts, there had been discharges of executors or administrators, as well as the settlement of final accounts. In

Griffith v. Godey, supra,

there does not seem to be any express reference to a discharge, but the case was decided so long after the settlement of the account of the administrator, that the usual order of discharge must have been entered. It appears from the report that the accounts were approved in 1872, and it was twelve years afterwards that the case was reached in the Supreme Court. In

Van Bokkelen v. Cook, supra,

it was alleged in the bill of complaint that a discharge had been granted, yet, the bill was sustained. In

Lataillade v. Orena, supra,
Silva v. Santos, supra,
Euler v. Euler, supra,
Ridenbaugh v. Burnes, supra,

it also appears that the Guardian had obtained his final discharge.

The liabilities of a guardian for use of ward's funds was recently considered by the Supreme Court of Montana. *In re* Allard 141, Pac. 661 (Ad. Sheet No. 5), and the old time rules applied.

The order of final discharge does not add anything to the decree of settlement of the final account. It is issued in pursuance of the final account.

Instead of protecting the guardian against an attack on his accounts, the obtaining of such an order, before the expiration of the year following the date of the majority of the minor, is an additional dereliction and an additional violation of duty. For a guardian to attempt to steal a march on his ward, by obtaining a discharge ahead of time is an act of fraud. The fiduciary relations and the obligation of perfect good faith, on the part of the guardian do not cease on the day of the majority of the ward. They continue during the time of settlement of accounts and for some time after the ward's majority.

Authorities cited above and

Pomeroy Eq., Sec. 961, and note 3 of Third Edition.

To obtain a discharge in violation of the law is an act of bad faith, and, in order to obtain such a discharge, the judge who signed it must have been imposed upon. He must have signed it inadvertently. If he had been made aware of the fact that the order was premature, he would not have signed it.

No excuse was proved at the trial, and no evidence was offered by the defendant to explain the procuring of this order. If anything, this fact should weaken the defense. We are not dealing here with a matter or a case conducted between adver-

saries who are dealing with each other at arms' length. The parties concerned here, viz., the guardian and the ward had sustained, and still sustained, fiduciary relations.

Indeed, if we look at the wording of the order itself, we shall see that it can have no possible effect upon this case, even if it be considered valid and regular. It is the settlement of the account that is the important order, and not the discharge.

With the exception of the title, the order is as follows:

> "It appearing that said estate and guardianship has been fully administered, and it being shown by the guardian thereof, by the production of satisfactory vouchers, that said guardian has paid all sums of money due from him, and delivered up under the order of the Court all the property of the estate to the party entitled and performed all acts lawfully required of him.
>
> "It is ordered, adjudged and decreed, that said guardian, John M. Smith, and his sureties be and they are hereby released and discharged from all liability to be hereafter incurred; that said estate is fully distributed, and the trust settled and closed.
>
> "Dated this 27th day of December, 1906.
>
> "E. K. CHEADLE,
> "Judge of the District Court."

The order was, presumably, intended to conform to Section 7696 of the Revised Codes, which reads as follows:

> "7696. FINAL SETTLEMENT, DECREE, DISCHARGE.—When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter."

though it goes somewhat beyond that section in declaring "the trust settled and closed," and in referring to the sureties.

But take it as it is, the order releases the guardian and his sureties from all liability to be *thereafter incurred.* In that, it conforms to the wording of the statute. That has nothing to do with any past liability. The effect of the order is to relieve the guardian, executor or administrator from his office and from further responsibility. After the entry of the order, he can, no longer, act officially. When valid, such an order, unless duly set aside or reversed, would, presumably, put an end to the jurisdiction of the probate court over the guardian, executor or administrator; but, as we have said, there is nothing in the order itself that otherwise affects the rights of the parties. The recital that the guardian has paid all sums of money due from him, can only mean that he has paid all sums of money shown to be due by the accounts settled. The order is made ex parte "upon the production of satisfactory vouchers." There was no hearing of any other party. No notice seems to be required; the matter is entirely ex parte. This order is, evidently, based on the vouchers produced. No notice was given. (Tr. p. 61.) If such an order were intended or purported to divest the heirs, wards or other persons in interest from rights of actions against the guardian or representative, if it purported or intended to deprive them of the right to re-open the accounts in equity, it would be void and in violation of the Constitution of the United States and the Constitution of the State of Montana, because it would be an attempt to deprive persons of their rights without due process of law. The right of the administrator or guardian to be released from further responsibility is one thing. It may be conceded that that may be accomplished in the manner provided

by the statute, but to deprive a party in interest of a right of action against the guardian or administrator for past doings, would be to deprive the latter of a valuable property-right, and to do so without any hearing, or any notice to him, would violate elementary and fundamental constitutional principles.

We, therefore, submit that the order, even if valid, would not affect the complainant's right here. The only result of the proof of the existence of this order is to show a discrepancy in the complaint. But the discrepancy is not serious, inasmuch as it relates to a matter which is not material. It would be merely a matter of formal amendment,—if any amendment were necessary—and on appeal it would be deemed to have been made. Even if the discharge were not void, it would not be a defense.

The alleged discharge of December 27th, 1906, is void.

We go further regarding this order, and respectfully insist that, insofar as it purports to be an order of discharge, it is void. Under Section 351 of the Civil Code "A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority."

It was the practice in equity, in the absence of any statute, to allow an infant one year after his majority to investigate the accounts of his guardian and to surcharge or falsify the same, if they were found to be wrong, and, under that rule, the guardian's bond was not to be delivered up until the expiration of the year.

In Re Van Horne, 7 Paige, 46;
Same case, N. Y. Chancery Rep. Lawyers' Ed. Vol. 4, p. 54.

The question of the validity of an order of discharge of a guardian prematurely made does not seem to have been passed upon in California. At least, we have not found any case in which that question was directly passed upon; but in the case of

Cook v. Ceas, 77 Pac. 65,

we find on page 68 a reference to the corresponding section of the California Civil Code.

The Court, after stating that a decree of discharge, such as is provided for in the case of an administrator or executor, can also be obtained by a guardian, and speaking of such a decree, it says:

> "And this evidently is the discharge which the court is prohibited from granting until one year after the ward's majority. Civ. Code §257. A guardian may settle with his ward the day after he comes of age, and obtain his release, but he cannot have a decree of court confirming the settlement and release until the ward has had a year to consider whether he will affirm or repudiate it. Id. §256."

The Civil Code has established a positive rule. The probate court is not authorized to violate it.

In Re Tuohy's Estate, 33 Mont. 230,

it is said on page 244:

> "It is well settled by the decisions of this court, that the district court sitting as a court of probate has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred, *and that in the exercise of its jurisdiction it is limited by the provisions of the statute.*" (Italics ours).

To the same effect

State Ex Rel Shields vs. District Court, 24 Mont. 1, and the cases there cited.

In State v. District Court, supra,

it is said on page 13, with regard to the powers of the court:

> "Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute."

In Smith v. Westerfield (Cal.), 26 Pac. 207,

it is said:

> "Proceedings for the administration of the estates of deceased persons and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory. The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision. The authority conferred upon the superior court by the above section to determine the heirship of claimants to an estate is a 'special proceeding,' within the meaning of that term as defined in the Code of Civil Procedure. Section 22, Id., declares that 'an action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offense;' and section 23 of the same Code declares that 'every other remedy is a special proceeding.' Jurisdiction of special proceedings is conferred by the constitution upon the superior court; but, inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized."

Freeman, in his work on Judgments, says, Section 319b, last paragraph:

> "The validity of orders and decrees made by courts

> exercising jurisdiction over the estates of decedents, minors, and incompetent persons is, however, as in all other cases, dependent on their having jurisdiction over the persons and subject-matters affected thereby, and whenever the statute requires a particular notice to be given, and the omission to give it is conceded, the order or decree based thereon must be treated as void. In truth, matters are regarded as jurisdictional in the probate, surrogate, and orphans' courts which are not so regarded in other courts. Thus a court ordering a sale of property is, according to the majority of the authorities, without jurisdiction to do so if the petition therefor was not presented by a person having authority to present it, or was not sufficient in substance to support the order sought, or did not substantially contain a statement of all the matters required by statute to be stated therein."

Under the Civil Code no power exists in the court sitting in probate to grant a discharge to a guardian until after one year. That is, really, now a rule of substantive law. The rule invoked by counsel for defendant, applicable to the premature entry of a judgment in actions, cannot apply. In the case of actions there has been a notice; the proceedings are adversary; the jurisdiction of the court attaches, and its powers are set in motion when the action is commenced. An action is a proceeding conducted according to the rules of the common law or of equity. These probate proceedings are special statutory proceedings, and, as declared by the Supreme Court of Montana, the court has no power except such as is conferred by statute.

II.

The decision of the State Court in Smith v. Smith is not res judicata.

This clearly appears from the decision itself. The decision

of the Supreme Court is reported in 45 Mont. 535. On page 579 near the foot of the page, the decision says:

> "It may be that upon the settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time, than was actually required of him, but that question is not before us;" etc.

Here, we have the express declaration of the court, that the matter of the interest was not before it. In the petition for re-hearing, the appellant again urged upon the court that he should be allowed interest, but counsel for respondent resisted, as shown by their brief in reply to the petition for re-hearing. The petition for re-hearing was denied, without any comment, and it, necessarily, follows that the court decided to stand by the decision as already made, and tacitly affirmed it.

Under the very wording of that decision, the matter of interest was not before the court, and, so, that decision leaves the matter open. There is nothing in the findings of the court below in that case which concludes the matter of interest. If there had been, the matter would have been before the Supreme Court, but we have seen that that court declared that the matter was not before it. The conclusions of the court below dealt with the sale.

This suit is not based upon the same cause of action as was before the State Court in Smith v. Smith. It is based on a different cause of action. That was a suit to set aside the sale. This is a suit to open the guardian's account, and to surcharge his accounts. Therefore, the rule laid down by the Supreme Court of the United States applies here, namely, in

> Cromwell v. Sac County, 94 U. S. 351;
> Davis v. Brown, 94 U. S. 423.

In Cromwell v. Sac County, the court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Under these decisions, it is clear that the decision in the State Court is not conclusive or applicable here. It is true that the complainant in this case, when before the State Supreme Court, sought to have the court allow him interest, and argued that under the prayer for general relief, the court had the power so to do, but it is also quite evident, from the decision, that the view thus urged did not find favor with the court, because it decided that the matter was not before it.

The contentions of the defendant in regard to the former adjudication are best answered by the language of the decision of the State Spreme Court which we have quoted above, and to which the appellant makes reference on page 60 of her brief, where the court positively says "that question is not before us."

In the face of that declaration, how can those who strenuously contended that the matter was not before the court and whose contentions were sustained, now insist that the matter was before the court! Counsel attempt to explain indirectly this change of attitude by suggesting that the statement of the

court was in effect an affirmance of the order of the District Court, approving the final account of John M. Smith as guardian of the complainant. The inconsistency as well as the futility of this contention of appellant is well illustrated by the excerpt from her counsel's brief in the state court in answer to the petition for a rehearing. (Trans. pp. 57-58.) In speaking of the claim for interest that brief says:

> "The third ground urged in the Petition for Rehearing is utterly without merit. The question involved is not before the court on this appeal. The matter was disposed of by this Court in the following language:
> "It may be that upon the settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, but that question is not before us." And how, we ask, could it possibly be before the Court in the proceeding? The foundation of plaintiff's action was and is the claim that the sale of the stock in question was fraudulent and void and the purpose of the action was to disaffirm the sale. Utterly routed in their attempt to overturn the sale in question, counsel now ask the Court at this time to treat their cause of action, disaffirming the sale as one *affirming* the sale and to now grant appellant relief upon that theory."

We submit that there is nothing either in the decision itself, or in the issues presented, to justify such an assertion. The account of John M. Smith, or the order of the court approving this final account are not referred to at all in the pleadings. They were not in issue insofar as the sale was concerned. They could not be, consistently with the allegations of the plaintiff, and the cancellation of the sale of the stock. It is only upon the theory of a valid sale or upon the affirmance of the sale that a claim for interest could be presented. As already explained, the opening of the account was contended for

merely by William Smith under the general prayer, if cancellation were denied. The supposition indulged in by counsel that the state court intended to say that the order approving the final account was a final order, conclusive except on appeal, is gratuitous. It may be said that the state court has stated that there was no actual fraud in the conduct of John M. Smith, but even that is subject to qualification insofar as the order of December, 1906, is concerned, as will be shown in a subsequent subdivision of this brief.

On pages 59-60, the appellants' brief quotes from the opinion of the court the statements regarding John M. Smith's good faith. In the part quoted from page 578, the court was evidently referring to the original transaction; that is, to the sale. In the part on page 579, the court says that the sum of eighty-five thousand dollars "after deducting expenses of administration has been fully paid them." That cannot mean any more than that eighty-five thousand dollars have been paid to the children or expended on their account, which is true as a matter of fact. Then this is immediately followed in the opinion as well as on page 60 of the brief, by the statement, that upon the settlement of the guardian's accounts, "it may be that he should have been required to pay a greater rate of interest, and for a longer period of time," etc., thus qualifying what has been said about the payment of the eighty-five thousand dollars. That statement of the court qualifies what it said on page 580, quoted on page 61 of the brief, that, (speaking of the purchase price) "all of it was accounted for when he became of age, and turned over to him." The rest of the statement quoted evidently had to do with the purchase. Again on page 580,

the reference to the guardian and the words, "and who, had in fact, fully accounted for all moneys paid over to him," evidently means accounted for the original principal. There was no evidence in that case and there was no claim there, any more than there is here that John M. Smith, in accounting, charged himself, or was charged, with any interest for the use of moneys from June, 1899, to December, 1900. There was no such finding made by the court below. There is no statement to that effect in the opinion of the Supreme Court. Indeed, if there was, it would have to be looked upon as a mere slip regarding a matter of fact, and not a ruling, because it would not be a ruling upon anything before them, but merely a statement made argumentatively. As to all such statements, we submit that the fair, the real, and only correct view to take is that the court was referring to the principal sum received by the guardian from the executor, leaving out of account the matter of the charge as to interest. Again where at the end of the quotation on page 63, of the brief, the words, "transaction otherwise regular and legal, by which no one had suffered any injury," evidently referred to the sale.

III

The order allowing the guardian to borrow the money.

This order was obtained by fraud and imposition on the court. Moreover, it is void, but whether void or not, it is no obstacle to recovery. The Circuit Court of Appeals in the case of,

Moore v. Smith, 182 Fed. 540,

discusses this order on the last page of the opinion. It is there said:

" * * * which order recited the false pretense that that guardian then made application to borrow the money of his wards which he had long before misappropriated to his own use, upon which sham and false statement the court undertook to make an order authorizing the guardian to borrow his wards' money at the rate of 3 per cent per annum.

We are of the opinion that the record shows that both the sale of the stock of the estate of the deceased William A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels of a scheme entered into by and between N. B. and John M. Smith and consummated as hereinbefore indicated, which was a fraud both upon the minors and the probate court," etc.

The contention that the former decision is conclusive has already been answered.

Counsel quote from the briefs of appellant, in the former case, to show that they attacked the order of December 11th, 1900. Of course, they attacked it. It was a matter of aggravation, so to speak, in the main case, in so far as it was contended by the plaintiff that it tended to show the consummation of John M. Smith's purpose in getting himself appointed guardian. But in so far as it bears upon the question of the right to interest it was not discussed by the court.

Counsel contend as we understand them;

1. That there was no fraud, according to the holding of the Supreme Court.

2. That the matter of the regularity of the order cannot be inquired into, and

3. That the question of the validity must be deemed to

have been in the mind of the court in deciding adversely.

As to the first point, we refer to the decision of this court in Moore v. Smith.

The Supreme Court certainly didn't decide that the use by a guardian of his ward's money without leave is meritorious, or lawful. Whether done in good faith or otherwise, such an act is certainly illegal, and so the matter of fraud is not eliminated. Legal fraud remains; what is known in equity as constructive fraud. The Civil Code, section 5380, declares:

"Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust." This applies to trusts of all kinds.

Among the preceding sections is 5375, which prohibits a trustee from using or dealing with the trust property for his own benefit. Other Sections in point are:

"4979; Constructive Fraud, What.—Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud."

'5073. Deceit, What.—A deceit within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The assertion as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. ¡The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

4. A promise, made without any intention of performing it."

"3787. RELATIONS CONFIDENTIAL.—The relation of a guardian and ward is confidential, and is subject to the provisions of the title on trusts."

"5374.—TRUSTEE'S OBLIGATION TO GOOD FAITH.—In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

It has been repeatedly held under this provision that bad faith or fraud in fact was not necessary.

> Smith vs. Goethe, 82 Pac. 384,
> Sukeforth vs. Lord, 25 Pac. 497.

may be cited as illustrations.

It will not be contended by counsel that these sections have been repealed or rendered null by any decision. A perusal of the decision itself will show that the Supreme Court did not say that there was any legality in the use of the money.

> See also, In Re Allard (Mont.) 141 Pac. 661, already cited.

In so far as the validity of the sale is concerned, which is the matter that they had disposed of, the Supreme Court did not regard the matter of the use of the money as of any conse-

quence. Neither the Supreme Court nor the State District Court held that John M. Smith had not concealed facts when he obtained that order, or in connection with his prior use of the money. Neither did they find that he or any one on his behalf ever informed plaintiff of the use of the moneys. In truth this fact was only discovered when the officers of the Union Bank and Trust Company were examined in the Moore case, viz., in 1908.

There is a finding of the District Court which holds as follows:

"On or about January, 1899, John M. Smith, spoke with Judge Armtsrong about using the guardianship moneys at four per cent."

But that does not say that he had told Judge Armstrong that he had actually used it. There is a finding relative to the order of December 11, which reads as follows:

"On December 11th, 1900, the order allowing John M. Smith the guardian, to use the money in his hands at three per cent per annum was made and entered, and at the same time, Waterman withdrew his name as counsel for the guardian, and that of N. B. Smith was entered as attorney for him."

That finds nothing more than that an order was made. We allege the order in our complaint, so there is nothing in that finding to conflict with our contentions. The Supreme Court incorporates in its opinion the statement made by the Court of Appeals in Moore vs. Smith preceding the statement with these words:

> "As stated in the brief of counsel for the appellant, 'the cause is before this court for determination on identically the same evidence on which it was heard in the

> circuit court of appeals.' We therefore take the following statement of facts from the opinion in that case (see *Moore v. Smith*, 182 Fed. 540):"

So there can be no question of the correctness of the facts regarding the application to borrow so far as disclosed by the evidence, or as stated by the Circuit Court of Appeals.

Mere irregularities may not suffice, but if the notice was essential, the failure is fatal. There is no claim that any notice was given.

The bill alleges in paragraph IV (Trans. p. 5) "That no notice of the application for said order was given to anyone or in any manner." There is no denial of this in the Answer, and there is no allegation that any notice was given. Under Equity Rule 30, averments (other than of value or amount of damage) if not denied are deemed confessed.

Section 7795, above quoted provides that the court may authorize a guardian "after such notice to persons interested therein as the court or Judge shall direct," meaning to persons interested in the estate. Here, no notice at all was given. That appears not only from the recitals of the order itself and from the pleadings but, also from the certified copy of the entries in the register or record of probate proceedings, which we have put in evidence.

This book is kept in pursuance of the provisions of Section 3048 of the codes. This section provides:

"The Clerk of the district court in addition to the duties prescribed by the Code of Civil Procedure and the Penal Code, must,—

"6. Keep a book called, "Record of Probate Proceedings," which must contain all the orders and proceedings of the

district court sitting in probate matters, as prescribed in Part III, Title XI., of the Code of Civil Procedure, which index must be indexed in the name of the deceased person, the executor or administrator, the guardian or ward."

"10. Keep a book called a "Register of Probate and Guardianship Proceedings," in which must be entered the name of the estate, the register number, with a memorandum of every paper filed, order or proceeding had therein, with the date thereof, and the fees charged."

Any order directing notice to be given, of course would be noted in the register.

If any notice had been given or ordered given the defendant could easily have proved the fact.

No order to give notice; no proof of notice; no written application, and no application, previous to the time of the making of the order, appear to have been made.

Even if the absence of notice were not absolutely fatal, it would be a very important fact in connection with the impeachment of the order, on the ground of fraud, and in connection with the matter of fraud, we note again that counsel referred to the finding of the District Court to the effect that in January, 1899, John M. Smith had talked to Judge Armstrong about borrowing the moneys at four per cent per annum, and we submit that this makes his case worse. The concealment and suppression of the fact of his appropriation of the moneys was deliberate. If the judge had been apprised then that the moneys, instead of lying idle in the hands of the guardian, had actually been used by him, and used to pay off notes on which he was paying nine per cent interest, the judge would

not have been given the impression that it was difficult to invest these moneys and would not have been likely to allow the guardian to borrow them at three per cent.

The absence of notice is only one of the objections urged against this. **Lack of power to make the order is also asserted by us.**

We shall now consider that question:

The section of the statute which authorizes the investment of money of a ward is as follows:

> "7795. (§4015.) *Court may order the investment of money of the ward.* The court on the application of a guardian or any person interested in the estate of any ward after such notice to persons interested therein as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his wards money in his hands in real estate, or in any other manner most to the interest of all concerned therein, and the court or judge may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The provision of the statute is that the court or judge may authorize the guardian to "invest" the money in his hands. Loaning to the guardian himself cannot be considered an investment. The borrowing of the money by the guardian could not be lawfully authorized, without express and positive provision of law permitting that to be done. It is worthy of notice that no such statute is known to exist. This question is very well discussed and thoroughly considered in

> Fidelity & Deposit Co. v. Freud. 80 Atl. 603; (Md.)

It is held in this case that to allow the guardian to borrow does not constitute an investment, and his retaining the money in his possession and using it himself, is not investing it.

Under such an order, the guardian would be both debtor and creditor. This is clearly, in conflict with the rule that no man should be allowed to have an interest against his duty. It is contrary to all principles that relate to trusts and trust funds.

> Second Pomeroy's Equity Jurisprudence, Sec. 1077.
> Perry on Trusts, Secs. 461-464.
> Hutson v. Jenson, 85 N. W. 689; (Wis.)

A void order is of course, no protection to anyone. If the order be treated as merely voidable or as having been obtained through imposition on the court or fraud, it should not be deemed to be a protection.

Where the guardian assumes a position antagonistic to his duty, he cannot, in that respect, act for the ward. When John M. Smith asked for leave to borrow the money he was acting in his own right, and not as guardian. He was asking an application in his own personal behalf. It would be against all logic and all reason to say that he could make such an application as guardian. He could not represent both parties or both interests, and we submit that no valid order could be made unless the wards were properly represented, and they could only be represented through a guardian of some sort acting in their behalf, even if such an order could be made at all.

The second and third points sought to be made by the defendant have to do with the question of the regularity and the validity of the order.

If the notice of application for such an order is jurisdictional, it can certainly be inquired into. It may be, that upon a collateral attack even this order, though made by a court

sitting in probate, would be deemed valid but that is beside the mark. The question does not arise here incidentally, as it arose in the former case. This is a direct attack upon it, just as much as if the suit were brought to set aside a judgment because there had been no service of summons. As to the nature of this action, in so far as it attacks the order of December 11th, 1900, we may accept as correct the definition or distinction made between direct and collateral attack in the case of

> Burke v. Inter-State S. & L. Assn., 25 Mont. 315, 321.

In that case, it is said that:

> "By 'collateral attack,' as the expression is used in this opinion, is meant every proceding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgment to be void *ab initio.*"

In so far as this suit seeks to have the judgment declared void *ab initio* for lack of power of the court, or for lack of a notice deemed essential, it is a direct attack. In so far as it seeks to set the order aside on the ground of fraud, it may be a collateral attack, but the right to make such an attack, if the facts warrant it, is conceded. We may cite Thompson vs. Whitman, 18 Wall. 457. The subject is also discussed in Hauswirth vs. Sullivan, 6 Mont. 203. This case was overruled in Burke vs. Interstate, supra, as to the effect of service on Sunday, but it is still instructive as to the question which now concerns us.

In Re Schandoney's Estate, 65 Pac. 877, is not an autority for the proposition that a notice is not essential because as will be seen by an inspection of that decision, the court did

not, really, hold that a notice was not necessary, although it did say that there was no duty resting upon the guardian to give notice, unless directed to do so by the court. That is not saying that no notice need be given. The court upheld the order in that case by indulging in the presumption that notice had been given but no presumption can arise in this case, because the fact is established, as above stated, that no notice was given, neither did that case involve a borrowing by the guardian.

Regarding the decision in Re Schandoney, it may be said that, while it refers to Freeman on Judgments, paragraph 124, it overlooks Freeman on Judgments, Section 319-b which we have cited and noted above. The latter section deals specifically with probate proceedings.

We submit that if the guardian were, by law, allowed to borrow, such an order could not be made without due notice to the ward, and without the latter being lawfully represented. To hold otherwise, would be to hold that a ward could be deprived of his property without the due process of law. If the court had authority to make such an order, in any case, it would follow that the official bond of the guardian would not apply to such a transaction. The sureties on the bond would not be liable for John M. Smith, as borrower. This is the only view consistent with reason and authority. The law entitles a ward to an official bond.

We submit that under the authorities quoted in this section, as well as under the decisions of the Supreme Court of Montana referred to above, namely, In Re Tuohy's Estate and State vs. District Court, that this order must be deemed to have been made without authority.

IV

STATUTE OF LIMITATIONS.

The statute of limitations had not run against this action.

Section 6460, quoted by appellant on page 41 of brief, has no application at all to this suit. It has been declared and held to be intended to extend the time within which an action may be brought, but not to shorten it.

Smith v. Hall, 19 Cal. 85.

This decision was made in 1861, prior to the adoption of this section in Montana. (This decision is not to be confounded with Quivey v. Hall, 19 Cal. 98.)

Lowell v. Kier, 50 Cal. 646.
In McMillan v. Hayward, 94 Cal. 257; 29 Pac. 774,

it is said:

> "The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary, in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. Such construction does not shorten his time, as limited by the general statute. It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year."

McMillan v. Hayward was referred to in

Whiteside v. Catching, 19 Mont. 394,

cited by defendant.

We do not have to rely upon that section, and, on the other hand, it cannot be invoked against us, because, under the pro-

visions of the statute of limitations, our action is not barred, as will be seen. Section 6461, (quoted by appellant on page 41) when applicable, as it is here, excludes Section 6460, because the former adds one year after the issuance of letters besides the time between the death and issuance.

The statute did not begin to run until the discovery of the fraud, and, in no event, could it begin to run before the date of the settlement of the final account. It is the final account that we are attacking and that we must attack, and that we are seeking to re-open. The final account covers the whole period of guardianship and purports to be complete in itself. The reopening of that, under the authorities, allows re-examination of the whole account from the beginning. That action did not accrue upon the date of the majority of the complainant, but upon the date of the settlement of the account. In truth, it is only from the date of the discovery of the fraud that the statute began to run.

But, whether we take the date of the settlement of the account or of the discovery, not more than six months of the statutory period had run, because of John M. Smith's absences from the state. The stipulation establishes conclusively that, at the time of his death, John M. Smith had been in the State of Montana only six months after the settlement of his final account. Therefore, at the time of his death, taking the shortest period, namely, that of two years, the statute still had eighteen months to run.

Now, as to Mrs. Smith's absences. The time between the death of John M. Smith and the issuance of letters is not to be considered, and is excluded.

Whiteside v. Catching, 19 Mont. 394.
Code Section 6461 (referred to below.)

It appears from the pleadings that the defendant herein was appointed executrix on the 7th day of November, 1908. The date of the issuance of the letters testamentary does not appear. It must have been later. That would be still better for us. But we will take the date which does appear, viz., the date of the appointment. From that date to the date of the commencement of this action, the defendant was in this state only fifteen months in all. That would make only twenty-one months, viz., fifteen months for her and six months for John M. Smith during which the statute would have been running. If we went back to the date of the majority of complainant October 10, 1906, there would still be less than two years.

But from the foregoing computation, five months should be deducted. Section 6461 of the Revised Statutes provides:

> "6461. (§544.) Where Person Dies Out of State.—If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator."

John M. Smith died on October 6th, 1908, in Battle Creek, Michigan. His death having occurred out of the state, the year following the date of the letters testamentary, is not a part of the time limited for the commencement of the action, any more than the time between his death and the issuance of the letters. During that year the statute was interrupted. Therefore, the statute did not begin to run again until No-

vember 8th, 1909. During these twelve months the defendant had been in the state five months, and all prior to November, 1909. Therefore, these five months should be deducted. That would leave only ten months for Mrs. Smith and only sixteen months in all from the settlement of the account.

There would be still less time if we figured from the date of the discovery of the fraud. It is, therefore, evident that the statute could not possibly have run.

Defendant denies that Section 6458 of the Revised Codes providing that the time of the absence from the State of a person against whom a cause of action accrues is not part of the time limited for the commencement of the action, applies to the executrix. They cite no cases in point, but rely upon general principles. We submit that their conclusion is clearly wrong. It is conceded that the absences of John M. Smith are to be deducted. Why should the rule be different as to his representative? Logically, if defendant's contention was sustained, it would follow that no cause of action accrues against an executor, and if no cause of action accrues against an executor, how can an executor be sued at all on claims arising in the life time of the deceased? The statute does not speak of "debtor," but of the "person" against whom.

When a cause of action thus arises, it is suspended by the death. It is revived against the executor or administrator upon the latter's appointment, (or possibly upon presentation of the claim. It is not material which). There has got to be an executor or administrator in order to be able to bring suit. Therefore, clearly, according to logic and good sense, the executor is the person against whom a cause of action accrues in

the sense of Section 6458. It seems quite clear indeed, that the person against whom an action may be brought is the person against whom the cause of action accrues, within the meaning of that Section.

This enactment is a reproduction of a very old statutory provision. It appears from a quotation made by defendant on page 37 from Amy vs. City of Watertown, 130 U. S. 326, that this provision goes back to the Statute of Anne, and as stated by the Supreme Court, was intended to remedy the difficulty arising from the absence of the defendant. It seems safe to conclude, that if there was any direct authority against our view, counsel would have found it.

In Anthes, Executor vs. Anthes, Administrator, 121 Pac. 553, 21 Idaho 305, the statute was applied in the manner we contend for.

Despite counsel's sweeping assertion to the contrary, the cases referred to by the court uphold its views.

In Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638, the exception of absence was applied even under the short statute applying to claims after presentation.

See also Titus v. Poole, 145 N. Y. 417, 425.

Smith v. Arnold, 1 Lea (Tenn.) 378, is directly in point; there were involved the very same question and a similar statute, as appears from the report itself.

Wilkinson v. Winne, 15 Minn. 159, is also in point. By reference to the compilation entitled "Statutes of Minnesota Revision 1866," page 452, it will be seen that section 15, referred to in the case, corresponded to our section 6458. In this Minnesota case, the debt fell due after the death of the

decedent, but that, in no manner, as we submit, detracts from the force of the decision. This Minnesota case is also in accord with the contention hereinbefore presented and with the California case of Smith v. Hall and other cases cited in the first part of this subdivision, to the effect that a provision similar to that appearing in our section 6460 was intended to lengthen and not to shorten the time within which an action could be brought. That was Minnesota section 18 appearing on said page 6452 of the statutes.

Jennings v. Brouder, 24 Tex. 192, is also a case in point.

This statute has nothing to do with the matter of the filing of the claim. It is not a question of whether a claim can be presented in the absence of the administrator. The question deals with time for commencement of an action, not the presentation of the claim. According to our view, it is really not material here whether the computation is from August, 1907, or from December, 1906. However, as defendant seeks to make some point about the presence of John M. Smith in the State in 1907, we may call attention to the fact that the pleadings in the case in the state court put in evidence by the defendant here, as a part of the judgment roll in that case, show that John M. Smith was at Battle Creek, Michigan, the famous sanitarium town, in September, 1907, and it was there that the notice of recission, and the offer to return the purchase price of the stock was made to him by the plaintiff. This is alleged in the complaint in that case, in paragraph X, which appears on page 81 of the transcript in this case, and the allegations of paragraph X are admitted by the answer in paragraph VII of the latter, on page 89 of said transcript. This bears out

the statement of the plaintiff while on the stand in this case, that the information which he received from his sister was imparted to him in August, 1907, although his memory was rather uncertain about the exact time. Here we see that John M. Smith was actually absent from the State in September, and therefore a portion at least of the eight months during which he was absent from the state in 1907 occurred after the discovery of the fraud by the plaintiff. If necessary, we could supplement the evidence regarding the absence of John M. Smith. If, instead of the two years, it is the five year limitation which applies, the action would not be barred, even according to the defendant's view of the meaning of section 6468. From November, 1909, the date of the appointment, to May, 1913, would be less than four years; adding six months for the time John M. Smith was in the state we have just about four years which could be computed.

There is nothing in the law and nothing in reason to require a creditor to assume the burden and expense of prosecuting proceedings for the removal of an administrator or executor. And, suppose a creditor did petition for the removal of the executor, would not the time continue to run against his claim, if it ran, at all, during the absence of the executor? And the time might run out while he was prosecuting this proceeding.

This is not a case where service by publication is authorized. Even if service by publicaiton could be had, it would still remain true that under such a statute as ours, the running of the time would be interrupted by absence.

Anthes v. Anthes, 121 Pac. 553; 21 Ida. 305, already cited.
Lane v. National Bank, 6 Kan. 74.

Chicago K. & N. Ry. Co. v. Cook, 43 Kan. 83; 22 Pac. 988.
Conlon v. Lanphear, 15 Pac. 600; 37 Kan. 431.
Hayden v. Pierce, Supra.

In the matter of actions on claims, no matter what the relations of the executor to the acknowledged creditors and the heirs, he is the party to be sued. He has duties and obligations towards the creditors and heirs, but he is, none the less, the party againt whom the suit must be brought.

Seculovich v. Morton, 101 Cal. 67; 36 Pac. 387, cannot be regarded as authority in this case. It is not authority in Montana. It was considered by the Supreme Court of Montana in the case of Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 500, and was criticised. Moreover, it seems that laches rather than the statute of limitations were the decisive factor in Seculovich v. Morton. The case was one to declare and enforce a trust in real property. It appears from the decision that no demand was made for a conveyance for twenty-four years, and the decision reads:

> "Irrespective of the question whether defendant's abscence from the state prevented the running of the statute of limitations, we think that judgment of the court below was right, because the plaintiff did not make a demand within a reasonable time. Failing to do so his action became barred by his laches. True, it is a general rule that the statute does not run against an express trust where there is concealed fraud; but when the injured party has been guilty of great laches in the prosecution of his remedy he will be barred in equity, on account of the paramount importance of having title settled."

From this we feel justified in saying that the case was decided upon laches and not upon the statute of limitations.

V.

STATUTE OF NON-CLAIM.

We must note at the outset of the discussion of this point that counsel are in error regarding the history of the legislation in California and in Montana. We should note, also, that the history given in Kerr's Annotated Code is not explicit regarding the time of the adoption in California of the provision relating to claims upon contracts. Indeed, Kerr's historical note may be misleading. It might give the impresssion that Section 1493 in its present form, and insofar as it relates to claims upon contracts, is merely a re-enactment of the Code of 1872, whereas we will see that it was an amendment of 1874, that modified this section so as to make it relate to claims on contracts.

It is desirable to establish definitely the time when Section 1493 of the California Ccdes was put into its present form and when the corresponding provision was enacted in Montana, so that the relevancy and application of decisions referred to may be determined with certainty. It was not until 1874 that this specific provision was enacted in California, and it was not until 1877 that anything like it was adopted in Montana.

The history of the California Legislation is as follows:

The provision barring claims not presented within the time specified in the notice or fixed by the statute was originally found in Section 130 of the Probate Practice Act of California. The original Section did not contain any reference to claims on contracts. Some amendments were made to it in 1860, and as thus amended, it read as follows:

> Section 130: "If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; Provided, that if it is not then due, or if it be contingent, it may be presented within ten months after it shall become due, or absolute; and provided further that when it shall be made to appear by the affidavit of the claimant to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this act, by reason of being out of the state, it may be presented any time before the decree of distribution is entered."
>
> (California Statutes of 1860, page 17.)

This was the form of the section in question at the time when Lathrop vs. Bampton, cited by plaintiff, was decided, namely, in 1866, and the decision itself refers to this section 130.

Section 130 of the Probate Act became Section 1493 of the Code of Civil Procedure of California in 1872. The section as re-enacted in the Code of 1872 differed somewhat in the wording, but insofar as the material parts are concerned, the provisions of the code were similar to that of the Probate Act.

In March, 1874, Section 1493 of the California Code was amended, and as so amended, it read as follows, insofar as it is material here:

> Section 1493: "If a claim arising upon a contract heretofore made, be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due * * * . All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice; and any claim not so presented, is barred forever; provided, however * * *"

(Amendments 1873-4, page 364, took effect July 1, 1874.)

In this form the section was adopted as a part of the Probate Practice Act of Montana, enacted February 16, 1877,

and appears therein as Section 150. (Laws of Montana 1877; also note on page 286 of the Revised Statutes of Montana of 1879 and on page 400 of the Compiled Statutes of Montana of 1887.)

Prior to February, 1877, the Statutes of Montana were so very much different that there was no similarity between them and the California Statutes or the old California Probate Act. The provisions existing prior to that time will be found in the codified statutes of Montana of 1871-2 on pages 349, et seq. Under the old law, no notice to creditors was required, and actions might be commenced without the presentation or "exhibiting" of a claim to the executor, the commencement of the suit being deemed an exhibition of the claim, although there was a time limit.

So far as Montana is concerned, the Probate Practice Act of February, 1877, was new legislation. This Act practically adopted those parts of the California Code of Civil Procedure relating to estates.

The California Section 1493 was again amended in 1880. The effect of the change was to shorten it and simplify it by doing away with the reference to contracts "heretofore made" and the contracts "hereafter made" and to deal with all claims upon contracts in one provision. As so amended, the material part reads as follows:

> "Sec. 1493. All claims upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is forever barred; provided, * * *"

In this last and definite form, this section was adopted in Montana by an Act approved March 7, 1895, with an addi-

tional proviso, however, relating to mortgages, and as thus enacted it became Section 2603 of the Code of Civil Procedure enacted in 1895. This Code followed closely the Code of Civil Procedure of California.

As stated in appellant's brief, the section is now designated as Section 7525 of the Revisel Codes of Montana.

It will thus be seen that counsel are in error in stating that Section 1493 of the California Code was a substantial re-enactment of the Act of 1860. Therefore, so far as we are concerned, the legislation embodied in this section dates in California from July, 1874, and in Montana from February, 1877. The differences made in the wording of the section since 1874 do not appear to be material. *As adopted in Montana, the section never related to any claims but claims on contracts, because the section did not have any previous existence, and in California the section was ameneded in* 1874, *so as to limit it to claims on contracts.*

As a result of the foregoing, we submit that California decisions made under the old law have no application, and that the only California decisions that would be relevant or in point would be those made under the law of 1874.

From March, 1874, down to February, 1877, there were no decisions rendered in California construing section 1493. We have found in the California reports between these dates only two cases dealing with claims against estates. These cannot be said to have any relevancy whatever. The first is the case of Whitmore vs. San Francisco Savings Union, 50 Cal. 145. In that case, it was held, that where a note had been given by a decedent with a trust deed to a third party to

secure it, the failure of the creditor to present a claim against the estate did not extinguish it nor affect the creditor's right to foreclose on the land affected by the deed of trust; so we need not consider that any further. The other case is that of the estate of Halleck, 49 Cal. 112. That was the case of a claim against an executor, of a deceased executor, on account of the latter's acts and omissions in the estate of which he was executor. It is held that the claim should have been presented to the estate, but the question of the time within which such claim should have been presented was not discussed at all for the very good reason that no presentation at all had been made. The section of the statute is not even referred to.

We therefore maintain that there had been no construction of this statute in California at the time of its adoption in Montana; and it cannot be said that any California decision is binding in Montana. In order to have that effect, the decision construing the section in question should have been rendered prior to February 16, 1877.

We can go further, and say, that from 1874 to 1895 there was no decision in California construing section 1493 as amended in 1874, that is, in the form of which we find it in the Probate Practice Act of Montana of 1877, or in the Code of Civil Procedure of Montana of 1895. We have been unable to find any such decision and none is cited.

So we feel justified in saying positively that the provision as it now stands, was not construed by the California Code prior to its adoption here.

Gillespie vs. Winne cited by appellant was decided in 1884. All that is pertinent to the present inquiry is quoted in appel-

lant's brief. It will be seen from the quotation, as well as by reference to the opinion itself, that while it is held that the claim therein questioned should have been presented, the question of the time within which it should have been presented was not discussed, so that the question we are considering was not discussed there, and the section was not referred to in the opinion.

In the case at bar a claim was presented. Therefore, decisions made in cases where no claim at all had been presented at any time are not applicable. In order to make good her point, the appellant must show that this claim was barred, unless it was presented within ten months. There is no provision barring claims not presented within ten months or other period mentioned in the notice to creditors or restricting the presentation of claims to such a period of time, except section 7525, and that section only applies to claims upon contracts. It does not apply to all claims or to such a claim as is presented here.

There is another provision of the Code under which it might be contended that all claims of any nature must be presented before a suit could be maintained upon the claim, and that is section 7532, quoted by appellant, and which says that "No holder of any claims against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: * * *".

But that section does not require that the claim shall be presented within any fixed period. It would satisfy the requirements of that section if the claim were presented at any time, while the estate was pending, or at all events, before a decree of distribution was entered.

Referring now to California decisions, it is submitted that the case of Lathrop v. Bampton and other cases under the old law have no application. Neither have cases under the new law which deal with claims upon contracts, unless it can be shown that the claim involved in this suit is upon a contract.

Hardin v. Sinclaire, 115 Cal. 460, 47 Pac. 363, holds that a claim on a tort need not be presented at all. This is accepted by Mr. Church as a correct rule. He says in Probate Law and Practice, page 735:

> "As the statute which relates to the presentation of claims against estate before actions can be maintained at all, relates to claims arising on contracts, other actions do not come within the rule. Thus no presentation of a claim is necessary before the bringing of an action to recover damages for wrongful acts."

This view is, also, accepted and applied in

American Trust Co. v. Chitty, (Okla.) 129 Pac. 51.

"Followed in Leverone v. Weakly, 155 Cal. 401"

McGrath v. Carroll, 110 Cal. 79; 42 Pac. 466, was a case upon an alleged express trust. The plaintiff in that case alleged, according to the report, "that the moneys were received and held by the deceased, in trust for the use and benefit of plaintiff, but the nature and terms of the trust are not, however, disclosed".

It is evident that on such an allegation, the only trust that could be assumed to exist was a trust arising from a contract, that is to say, a trust of a contractual nature.

Grubb v. Chase, 158 Cal. 352, 111 Pac. 90, also cited by appellant, held that a suit upon a claim against an estate must correspond to the claim presented. The evidence in that case showed that while the claim alleged was for goods, wares,

etc., sold and delivered, the action should have been for fraud. The lower court whose opinion is quoted in the decision we are now considering, held that the claim proved was entirely dissimilar from that alleged, and, therefore, that the plaintiff could not recover. The decision in upholding that view goes beyond it, and says that an action on such a claim, that is to say on the fraud, would have to be presented according to law, and cites McGrath v. Carroll, but nothing is said about Hardin v. Sin Claire. It is submitted that even as to the necessity of presentation, the California decisions cannot be said to leave the matter in a satisfactory condition. Anyhow it will be noticed that in Grubb v. Chase there had been no presentation at all of the claim founded upon fraud. So this was, also, a case involving not the question of the time within which a claim should be filed, but a case where no presentation at all had been had, and, therefore, a case involving merely the question of the necessity generally of presenting a claim. The case does not touch the question we are discussing here. It will, therefore, be seen that the question now under discussion has never been passed upon or considered in California, and that as to whether a claim not arising upon contract must be presented, there is conflict with the California decisions.

Montana Cases.

In Higgins Estate, 15 Mont. 474 (decided in March, 1895), Judge Hunt delivering the decision, says on page 487-8, with reference to claims against estates:

> "The creditor cannot maintain his suit, under section 157, against an estate, unless he has presented the claim to the executor. And, by section 150, if the claim be one

> arising upon a contract, unless presented within the time limited in the notice, it is barred forever, except under particular conditions."

The references are to the Probate Practice Act, adopted as stated above in February, 1877, and reproduced in the Compiled Laws of 1887. It is evident from this quotation that the Supreme Court of Montana at that time understood these sections to mean exactly what we are contending for here. No other Montana case has dealt with this question.

Melton v. Martin, 28 Mont. 150, cited in appellant's brief as "Melton v. Jones," was, according to the opinion, a case for money had and received. A presentation of the claim was made, but after the expiration of ten months. The contention was not that the claim was presented in time, or that it was not covered by section 2603 of the Code of 1895, viz., section 7525 of the Revised Codes. The contention was that the delay in the presentation of the claim was excused because, as asserted at the trial, the money had been paid by mistake, and the mistake had not been discovered until after the expiration of the ten months period. It was evidently taken for granted by exerybody that the case fell within the provisions of section 7525, viz., section 2603 of the old code, unless it could be regarded as a suit in equity to follow a trust fund. There was no discussion of the question of whether or not claims not on contract had to be presented within the ten months. The claim was evidently treated by the court as a claim arising upon contract, so that when the court said, "Under Section 2603, Code of Civil Procedure, all claims must be presented within the time limited in the notice or they are barred forever, except in cases * * *", the court meant nothing more than

that claims covered by that section were to be so presented; and the general expression cannot, reasonably, be made to apply to cases not similar and to questions not before the court. In speaking about the attempted excuse for non-compliance, the court said:

> "We are not satisfied from the pleadings and statement of facts that a mistake ever existed, and, if it did, that plaintiff should not have discovered its existence within the time limited in the notice by the exercise of reasonable diligence."

That was the only point sought to be made in the case to show that the presentation after the expiration of the ten months was insufficient. Another contention in that case was that the deceased held the money as a trust fund, and, therefore, it was not necessary to present the claim at all. In disposing of that contention, the opinion said:

> "But the pleadings are barren of any such suggestion, or of the further necessary suggestion that the identical money could be traced into the hands of defendant. Besides, this is not an action in equity to enforce a trust, but a suit at law to recover money 'had and received,' and the claim should have been presented to the administrator of the estate within ten months after the first publication of notice to creditors."

It will be seen that no opinion is expressed as to whether presentation would have been necessary if the action had been one in equity to enforce a trust, but one might imply that if that had been the character of the suit, the court would have held that presentation was not necessary.

Melton v. Martin canot be considered an authority applicable to the case at bar.

In Dorais v. Doll, 33 Mont. 314, the claim there in question was presented in time and no question arose regarding the

time of presentation or the character of the claims which must be presented. That was an action to recover "a balance alleged to be due upon a settlement between the parties for ice sold and delivered by plaintiff to defendants." Clearly, a case on contract. The only matter there discussed, under the probate provisions relating to claims, was the sufficiency of the affidavit and of the endorsement or rejection of the claim. The claim was presented at the office of the attorney of the administrator. As stated in the opinion on page 318, "The attorney, under the direction of the administrator, endorsed the claim 'Rejected,' and signed the administrator's name." The question of whether the presentation at the office of their attorney was proper was not discussed at all. Moreover, it appearing that the administrator gave directions to the attorney to endorse the claim "rejected" and to sign the administrator's name, it must be presumed that the administrator was present when that was done. So, the case is not even an authority upon the question of whether an administrator can require claims to be presented at a designated place, in his own absence.

This is not a claim upon a contract. There was no contract between the guardian and minors. The duties of the guardian are imposed by law. The rules of duty and the liabilities imposed upon the guardian arise under our Civil Code and the rules of equity. Some of these are similar to the rules applicable to trustees in express trusts, but a clear distinction still remains between an express trust and a trust like the one in question here. The obligations of a guardian arise by operation of law. The Civil Code, section 4893, provides:

"An obligation arises either from:

1. The contract of the parties; or,
2. The operation of law.

An obligation arising from operation of law may be enforced by civil action or proceeding, or in the manner provided by law."

"4966. Essential Elements of Contract.—It is essential to the existence of a contract that there should be:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and
4. A sufficient cause or consideration."

The complainant obtained his majority in October, 1906. The complainant was under fourteen years of age at the time that John M. Smith was appointed guardian, so the complainant did not have even the selection of the guardian; nor could there have been any contract between them. Complainant obtained his majority in October, 1906, as stated in appellant's brief. The guardian was appointed in March, 1899.

Lathrop v. Bampton has nothing to do with the question of whether a claim, such as is asserted here, is one on contract or not. That case does hold that where trust property has lost its identity and cannot be clearly or specifically traced and followed, the claim becomes one for the recovery of money only. That is quite true. The same may be said of other cases cited.

In Ellison v. Moses, also cited by appellant, Lathrop v. Bampton is quoted as authority in favor of the principles just above stated, viz, that when the identical property cannot be identified or the funds followed, that the claim becomes merely a money demand without any lien or preference or rights other

than those of a general creditor, and in saying that "the trustee's personal liability to make compensation for the loss occasioned by breach of trust is a simple contract equitable debt," the court was considering and determining whether such a claim was one entitled to any preference, and decided that it was not, and that there was no equitable lien.

Pomeroy in the paragraph quoted by appellant, viz. 1080, deals with express trusts. (It will be noted that what the author calls sections are not the paragraphs designated by numbers but the divisions designated by Roman numerals.) Express trusts are dealt with in section VI., the other trusts in section V. In paragraph No. 1059, the author says:

> "*The duties and liabilities of the trustees and corresponding rights of the beneficiaries in trusts arising by operation of law have been explained in the preceding section.* The discussions of the present section refer primarily and mainly to the powers, duties, and liabilities of the trustees in express trusts of all kinds and for all purposes, and the statement of their duties and liabilities necessarily includes the correlative rights and remedies of the *cestuis que trustent;* some of the conclusions may, however, apply to the trustees in resulting and constructive trusts. The entire subject embraces the following subdivisions: 1. The trustee's powers and modes of action; 2. His duties and liabilities; 3. His compensation and allowances; 4. Removal and appointment of trustees." (Italics ours.)

Conversion or appropriation of funds to his own use by a guardian is a tortious act.

It will be evident upon a moment's reflection that cases dealing with the question of whether a claim arising upon a breach of trust is endowed with any greater rights than those of a general creditor, or cases distinguishing between "simple contract debts" and "specialty debts," are not determinative

of the question at issue here. Evidently, too, there are trusts and trusts. According to Pomeroy, paragraph 1079, the expression "breach of trust" may be applied to the action of persons who "intermeddle with trust property," as well as to persons regularly appointed trustees, yet one who becomes a trustee involuntarily and by operation of law, as, for instance, a person "to whom property is transferred in violation of a trust" has not made any contract. Where it becomes essential to decide whether a particular relation was a contractual one or not or a liability is one, properly so-called, arising upon contract, general expressions must be carefully limited.

Here the action is one to re-open the guardian's account for fraud, actual and constructive, and to surcharge him with interest because of his misfeasance and non-feasance. The liability for interest, either simple or compound, surely is not one arising on a contract. It is imposed by law.

In a case of this kind, where the liability is so clear, courts will not strain a point to protcet the wrong-doer.

This is not a suit on the guardian's bond. Even if by any fiction of law, the complainant at any time might have been allowed to recover as upon an implied contract, or if by some such fiction, the guardian might have been held liable as upon an implied contract, it is submitted that in reality there was not, and is not, any contract, and that neither he nor his successors can seek to avoid liability by resorting to any fiction of law. These fictions were indulged in for the protection of the creditor and not for the protection of the debtor or the wrong-doer.

Our Civil Code classifies trusts as follows:

"5364. TRUSTS CLASSIFIED.—A trust is either:

1. Voluntary; or,
2. Involuntary."

"5365. VOLUNTARY TRUST, WHAT.—A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another."

"5366. INVOLUNTARY TRUST, WHAT.—An Involuntary trust is one which is created by operation of law."

"5370. VOLUNTARY TRUST, HOW CREATED AS TO TRUSTOR.—Subject to the provisions of §4537 (1311), a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust; and,

2. The subject, purpose, and beneficiary of the trust."

"5378. INVOLUNTARY TRUSTEE, WHO IS.—One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

"5373. INVOLUNTARY TRUST, RESULTING FROM FRAUD, ETC.—One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Civil Code, section 3787, provides that "the relation of a guardian and ward is confidential, and is subject to the provisions of the title on trusts."

The guardian is subject to these provisions, but he is not called "trustee."

On principle, it is demonstrable that the claim is one in tort. In the Law of Torts by Burdick, we find:

"THE DISTINCTION BETWEEN A TORT AND A BREACH OF CONTRACT is broad and clear in theory. In practice, however, it is not always easy to determine whether a particular act or course of conduct subjects the wrongdoer to an action in tort, or merely to one for a breach of contract. The test to be applied is the nature of the right which has been invaded. If this right was created by the agreement of the parties, the plaintiff is limited to an action *ex contractu*. If it was created by law he may sue in tort. A few cases in addition to those cited in the last note will illustrate the difficulty experienced by lawyers in applying this test." (Page 14).

In Rapalje & Lawrence's Law Dictionary under "Breach of Trust" we find, paragraph 2:

"REMEDY FOR.—A breach of trust is in the nature of a tort, and entitles the *cestui que trust* who has been injured to compel the trustee to make good the loss caused by it. There is even something penal in the relief given in some cases of breach of trust: thus, where a trustee has employed trust funds in his own business, and has thereby made a profit, the *cestui que trust* is entitled to it, although the trust estate has not been injured. (Lew. Trusts 742; Wats. Comp. Eq. 885.) As to accounts with rests directed against trustsees, see Account, §§ 12, 14."

Cooley in his work on Torts includes "Wrongs in Confidential Relations," and under that head he deals with liabilities of trustees, executors, guardians, etc. (2nd Ed., sections 523-525.)

VI.

f the Statute of non-claim or the statute of limitations were applicable, the court, in order to do justice, could and should disregard it, and relieve the complainant.

Newberry v. Wilkinson, 199 Fed. 673.

Under the decision of the court in that case, we submit that

the complainant would be entitled to relief, despite the statute of non-claim and the statute of limitations. Neither the statute of non-claim nor the statute of limitations should be allowed to stand in the way of justice. It is made plain in that decision that although the statute of non-claim and the statute of limitations will usually be applied, yet, for equitable considerations the court may suspend or bar their application, and in the last paragraph of the opinion it is stated that if that suit had been seasonably instituted after the plaintiff therein had become of age, the bar of the statute of non-claim would not have stood in the way of his recovery.

Here the complainant seasonably and promptly brought a suit, which, according to the decision of this court in Smith v. Moore, he was entitled to maintain. Upon the death of his former guardian, the action was continued against and litigated with the executrix. After the adverse decision in the state court he seasonably re-presented the claim now sued upon and brought his suit. He surely was diligent and did the best he could. The claim in itself is eminently just. The case is one which appeals most strongly to a court of equity.

VII

LACHES.

The complainant has not been guilty of any laches. He brought suit very promptly after the discovery of the fraud. If he had been in a position to bring his suit in the United States Court, like his sisters, he would have recovered the original property. While it is true that the State Court decided against him, it is also true that the decision of the court in Moore v. Smith affords ample justification for the bringing of the suit

to rescind. There was, therefore, no neglect on his part. He was doing his best.

"Brown vs..Fletcher. 182 Fed.,,965".

VIII.

ELECTION OF REMEDIES

Regarding this point all that seems necessary for us to say is that the point sought to be made in appellants brief is wholly inconsistent.

Counsel fail to distinguish between the nature, as well as to the consequences of affirmance and disaffirmance. If a party affirms, with a full knowledge, he may not, as a general rule, afterwards disaffirm; but if he seeks to disaffirm and fails, the transaction remains intact and his rights by virtue of the transaction remain unimpaired. For instance, suppose a vendor to whom money is due, as a part of the consideration of a sale, seeks to disaffairm the sale on the ground of fraud, but fails, does he lose his right to recover the balance due him? Evidently not. The statement in defendant's brief of the nature of the remedies available to the plaintiff is decidedly erroneous. It is said therein, page 41:

> "In other words, the plaintiff had two remedies available to him either to affirm the sale and demand judgment for his share of the proceeds thereof, or to set aside the sale and demand his share of the stock of the estate of William Smith, and all dividends paid thereon, and the profits flowing therefrom which came into the hands of John M. Smith."

The plaintiff did not have a right or any occasion to demand judgment for his share of the proceeds of the sale, if he affirmed the sale. If the sale was affirmed, either by him or by judgment, it necessarily followed that the proceeds of the sale had been paid over to his guardian. His remedy, other

than setting aside the sale, was to proceed against his guardian because of the latter's use of the moneys received by him. That would impliedly, in a case of this kind, affirm the sale; but proceeding against the guardian for the use of moneys received by him, is quite a different thing from demanding judgment for the price or proceeds of the sale. Evidently the latter could only be demanded from the *vendee*, as such, or somebody who would owe for the price. When received by the guardian, the proceeds became, simply, guardianship funds. The source whence the funds came is not material in a proceeding against the guardian for their use.

Appellant might as well contend that if the guardian had withheld part of the moneys admitted to be due, the defendant would have lost his right thereto by bringing his other suit.

IX.

THE FORM OF THE DECREE.

Counsel criticise the form of the decree. They must have overlooked the last paragraph thereof wherein it is decreed that the "estate of John M. Smith, Deceased, and said Mary M. Smith, as Executrix of the Estate of John M. Smith, defendant, pay in due course of administration the amounts hereinbefore specified and found due to the complainant."

In conclusion, we respectfully submit that the reasoning of the court below in support of its decision is unanswerable and that the decree ought to be affirmed.

T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
T. J. HOOLAN,
Of Counsel for Appellee.